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In the

Supreme Court of the United States

OCTOBER TERM, 1973

CHARM PROMOTIONS, LTD.,

Petitioner,

vs.

THE TRAVELERS INDEMNITY COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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THE TRAVELERS INDEMNITY COMPANY,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Charm Promotions, Ltd. ("Charm") respectfully requests this Court to issue a writ of certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit, entered on November 9, 1973.

DECISION BELOW

The decision of the Court of Appeals is reported at 489 F.2d 1092 (7th Cir. 1973). The opinion is reprinted in the Appendix. A petition for rehearing was denied by a majority of the panel on March 7, 1974. Judge Cummings voted to grant the petition for rehearing. The order denying the petition for rehearing is printed in the Appendix.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

ISSUES PRESENTED

1. Whether Charm was denied its constitutional right to a fair trial by the trial judge's *ex parte* instructions to the jury during their deliberations when the record shows that the judge's improper conduct caused the jury to return a verdict against Charm?

2. Was it error for the Seventh Circuit to hold—in conflict with decisions of this Court and the Third, Eighth and Tenth Circuits—that Charm had the burden to show prejudice from the trial judge's improper communication with the jury during their deliberations?

3. Does the impropriety of a trial judge giving additional substantive instructions to the jury during its deliberations, without notice to counsel and in the absence of counsel, constitute *per se* reversible error?

STATEMENT OF THE CASE

Charm Promotions, Ltd. ("Charm") filed a verified complaint in 1967, seeking recovery upon a fidelity bond issued by The Travelers Indemnity Company ("Travelers") for financial losses that Charm had suffered through the dishonest diversion of funds by two of its officer-employees, Mel Goldman and Ronald M. Brown. Travelers, in turn, filed a third-party complaint against Goldman, Brown and a third person, Bernie Schulman, to recover all sums adjudged against Travelers in favor of Charm.

Following initial pretrial discovery, the trial judge granted Travelers' motion for summary judgment. The

entry of summary judgment was reversed on appeal and the case remanded for trial. *Charm Promotions, Ltd.* v. *The Travelers Indemnity Co.*, 447 F.2d 607 (7th Cir. 1971).

The trial commenced on June 19, 1972, and lasted until the late afternoon of June 30, 1972. The jury deliberated for two days before returning a verdict against Charm. Judgment was entered on June 30, 1972. A motion for new trial was denied by order of September 13, 1972.

As a main ground for appeal Charm argued that the trial judge's *ex parte* substantive instructions to the jury during their deliberations compelled reversal. The facts presented in connection with this contention showed the following:

During the second day of their deliberations, the jury sent a written note, addressed to the judge, inquiring whether Charm's employees could be held criminally liable for their diversion of corporate funds. Without notice to Charm's counsel and in the absence of counsel, the trial judge answered the jury's question in the negative. The note was not preserved by the trial judge, so neither the question(s) propounded by the jury nor the judge's reply was included in the record. The trial judge did not inform Charm's counsel, at any time, that such *ex parte* communication had occurred. Counsel did not learn about the secret communication until approximately a week after the jury had rendered its verdict.

Because the record did not contain the written question asked by the jury, Charm filed affidavits of two jurors setting forth the general character of the inquiry. As summarized by the Seventh Circuit:

> "[T]he jury asked whether Brown and Goldman 'could have a criminal judgment brought against them;' the judge wrote back 'No.'" (Appendix 4a)

The affidavit of juror Ruth Scheele further recited that "the jury requested the trial judge to have his court reporter re-read the instructions because we didn't hear parts of them." The trial judge refused this request. (Trial transcript, p. 1287.)

The initial affidavits from the jurors dealt only with the objective circumstances of the judge's communication to the jury. An effort was made to reconstruct what happened, but counsel did not ask the jurors to give their reasons for making inquiry to the judge during their deliberations or to describe the influence of the judge's response upon the jury's verdict. Under this Court's decisions in *McDonald* v. *Pless*, 238 U.S. 264 (1915), and *Fillippon* v. *Albion Vein Slate Co.*, 250 U.S. 76 (1919), counsel did not think it was proper or necessary to interrogate the jurors about the process by which they reached their verdict.

By a *per curiam* opinion, the Seventh Circuit held—contrary to the law in other jurisdictions—that Charm had the burden to show prejudice from the trial judge's *ex parte* communication with the jury. The Seventh Circuit concluded that the trial judge acted improperly, but that Charm had not proven prejudice because the panel determined, as a matter of fact, that the jury's inquiry and the judge's substantive instruction were "not related" and "irrelevant to the ultimate issue: Travelers' liability to Charm for the dishonest acts of Charm's employees." (Appendix 5a, 6a.)

Thereupon, to make the true facts of record, Charm filed a petition for rehearing and submitted the supplemental affidavit of juror Ruth Scheele stating that the jury was deadlocked on the issue whether Charm should recover from Travelers; that the jury's inquiry related directly to this

issue; and that the trial judge's instruction caused the jury to return a verdict for Travelers. Despite this evidence that the factual assumptions underlying its decision were completely mistaken, a majority of the panel denied the petition for rehearing.

As additional grounds for reversal, Charm argued that the trial judge erred by:

(i) allowing Travelers to conduct lengthy examination regarding Charm's earnings and to argue that Charm still made a profit despite the theft of funds;

(ii) permitting third-party defendant Schulman to file an unrelated and sham claim against Charm in violation of Rule 14; and

(iii) instructing the jury that Illinois law required Charm, a close corporation, to observe corporate formalities designed for publicly-held corporations in order to recover on the fidelity bond.

The foregoing errors introduced into the trial matters which were irrelevant under the terms of the fidelity bond; reference to these matters confused the issues for consideration by the jury.

The Seventh Circuit assumed that the trial court's rulings on the filing of Schulman's claim and its instructions regarding corporate prerequisites were erroneous, but held the errors were "not prejudicial." (Appendix 7a, 9a.)

REASONS FOR GRANTING THE WRIT

I. THE SEVENTH CIRCUIT'S RULING CONFLICTS WITH THIS COURT'S DECISIONS IN FILLIPPON v. ALBION VEIN SLATE CO., 250 U.S. 76 (1919), AND SHIELDS v. UNITED STATES, 273 U.S. 583 (1927).

This Court long ago declared that it is improper for a trial judge to receive a communication from the jury and answer it without notice and an opportunity for counsel to be present. Such interference with the jury's deliberations violates the constitutional rights of a litigant and entitles him to a new trial. The decision in *Fillippon* v. *Albion Vein Slate Co.*, 250 U.S. 76 (1919), condemns all communications between the judge and jury in the absence of the parties and their counsel. As Chief Justice Taft stressed later in *Shields* v. *United States*, 273 U.S. 583, 588 (1927):

> "In the case of Fillippon v. Albion Vein Slate Co. [250 U.S. 76 (1919)], which was a suit for damages for personal injuries, it appeared that after the trial judge had completed his instructions and the jury had retired for deliberation, and while they were deliberating, it sent to the judge a written inquiry on the question of contributory negligence, to which the trial judge replied by sending a written instruction to the jury room in the absence of the parties and their counsel, and without their consent, and without calling the jury in open court. *A new trial was ordered on this account.*" (Emphasis supplied.)

The fact the trial court in *Shields* had communicated with the jury was itself sufficient for reversal; this Court found it unnecessary to consider the additional claim that the note sent to the jury room was erroneous in substance.

There are sound practical reasons for the legal doctrine that *ex parte* communication by the trial judge to the jury

requires reversal without delving into its effect upon the verdict. There is no way to reconstruct what might have happened if the trial judge had notified counsel when the jury made inquiry and gave counsel a chance to be heard with respect to the giving of additional instructions. In this case, counsel had no opportunity to alert the trial court to possible error so that immediate correction might be made. *Fillippon* v. *Albion Vein Slate Co.*, 250 U.S. 76, 82 (1919).

It is impossible to determine the impact of a particular communication, or guess how an alternative answer might have influenced the jury, from the record alone. Consequently, the impropriety and potential abuses inherent in such secret communications have been held sufficient to compel a new trial without the need to measure the harm caused by the misconduct in each instance.

By placing the burden upon Charm to show the prejudice from the *ex parte* instruction, the Seventh Circuit's ruling impels counsel to question jurors about the factors that contributed to their ultimate verdict. Otherwise, counsel faces the dilemma that the appellate court will not find his "proof" of prejudice sufficient. Thus, the procedure mandated by the Seventh Circuit compounds the trial judge's error by further interference with the jury's deliberation. *McDonald* v. *Pless*, 238 U.S. 264 (1914). Once it has been shown that the trial judge improperly gave a substantive instruction to the jury during their deliberations, the party aggrieved by that action should not be forced to question jurors why they made inquiry to the judge and the way that the judge's reply influenced their decision.

Moreover, it must be stressed that the trial judge failed to maintain a record of the jury's communication or even to inform counsel that such communication occurred.

> "Consequently we cannot know whether the instructions given, even though entirely sound as abstract legal statements, were appropriate to answer it, or whether additional instructions, appropriate and indeed necessary to supplement those given, might not have been suggested to the trial judge by counsel for the defendant if he had been given the opportunity to be present." *Arrington* v. *Robertson*, 114 F.2d 821, 823 (3d Cir. 1940).

These failures are inconsistent with the proper administration of justice. "Any question propounded by the jury, as well as the answer by the trial court, should affirmatively appear of record. It is an element of the trial itself." *Chicago, Rock Island & Pacific R.R. Co.* v. *Speth*, 404 F.2d 291, 294 (8th Cir. 1968). See also *Jones* v. *United States*, 308 F.2d 307, 311 (D.C. Cir. 1962). The absence of these matters from the record compels reversal under the standards enunciated by this Court.

II. THE SEVENTH CIRCUIT'S RULING DIRECTLY CONFLICTS WITH DECISIONS IN THE THIRD, EIGHTH AND TENTH CIRCUITS.

The other judicial circuits hold that a judge's *ex parte* communication to the jury regarding issues raised in a case interferes with a right which is fundamental to a fair trial. Following this Court's decision in *Fillippon*, "the federal courts have consistently reversed" judgments because "a judge gave additional substantive instructions to the jury without notice to counsel." *United States* v. *Dellinger*, 472 F.2d 340, 378 (7th Cir. 1972).

On facts almost identical to this case, the Tenth Circuit reversed a judgment entered on a jury verdict in *Parfet* v. *Kansas City Life Insurance Co.*, 128 F.2d 361, 362 (10th

Cir.), *cert. denied,* 317 U.S. 654 (1942). The Tenth Circuit held:

> "After the case had been finally submitted to the jury, and while the jury were engaged in their deliberations, they handed to the bailiff a note to the judge in which inquiry was made as to whether it was necessary that a motive be shown by the evidence in order to warrant the jury in finding that the death was by suicide. The bailiff handed the note to a deputy United States Marshal; he took it to the residence of the judge and there handed it to him; the judge directed the deputy to answer verbally 'no'; and that was accordingly done. The parties and their attorneys were not present, were not consulted, and did not consent to such communication between the court and the jury. The matter to which the inquiry related had been covered in the instructions of the court, and it may be conceded that the answer was a correct statement of the law. But where a case had been submitted to the jury and in the course of their deliberations the jury request additional instructions, such instructions should be given in the presence of the parties or their attorneys, or after notice and opportunity to be present. *It is error for the court to receive a communication of this kind from the jury and make reply thereto in the form of an additional instruction in the absence of the parties or their attorneys, or without notice and an opportunity to be present, even though substantial prejudice is not affirmatively shown.*" (Citations omitted.) (Emphasis added.) 128 F.2d at 362.

The *Parfet* decision leaves no doubt that the trial judge's *ex parte* answer to the jury constituted the giving of additional "substantive instructions." The jury asked about an issue that had arisen in the case and troubled them during deliberations. Rather than notify and give counsel an opportunity to be heard, the trial judge interpreted the note from the jury himself and gave a response that guided

the jury according to the particular meaning that he gave the note.[1]

Indeed, this case presents stronger circumstances for reversal than *Parfet* because the judge's response to the jury's note was wrong. The jury's question was open to several interpretations, none of which called for the trial judge's flat "no." The jury most likely was asking: "Could the actions of Brown and Goldman subject them to criminal liability?" The proper answer to that question, on the evidence presented, was "yes."

The Third Circuit holds that the type of *ex parte* communication between judge and jury which occurred in this case denies due process of law and requires reversal. As stressed in *Arrington* v. *Robertson*, 114 F.2d 821, 823 (3d Cir. 1940):

> "The action of the trial judge in the present case in sending instructions to the jury from his chambers in the absence of the defendant or his counsel and without giving them notice and an opportunity to be present amounted to a denial of due process of law. *We hold that it was the denial of a right so fundamental as necessarily to affect the substantial rights of the defendant regardless of the nature or propriety of the instruction given.*" (Emphasis added).

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[1] The Seventh Circuit's holding that "the judge's conduct was harmless" rested on the premise that Rule 61 has vitiated the authority of *Fillippon* and the decisions of the Third, Eighth and Tenth Circuits. The short answer is that *Parfet*, *Arrington* and *Speth* were decided after promulgation of Rule 61 in 1937. In response to the argument in *Parfet* that the judge's error was harmless, the Third Circuit held that the evidence presented an issue for the jury:

> "It follows that the communication passing between the court and the jury, in the absence of the parties or their attorneys and without notice and an opportunity to be present, cannot be regarded as harmless for the reason that under the evidence no other verdict could have been returned." (128 F.2d at 362.)

The same result was reached in *Breslin* v. *National Surety Co.*, 114 F.2d 65 (3d Cir. 1930).

The Eighth Circuit has also held, contrary to the decision below, that it is reversible error for the trial judge to give "additional instructions" in the absence of counsel after a case is submitted to the jury. *Chicago, Rock Island & Pacific R.R. Co.* v. *Speth*, 404 F.2d 291, 294 (8th Cir. 1968). The opinion in *Speth* states:

> "The matter of 'additional instructions' in absence of counsel after a case is submitted to a jury has been a subject frequently discussed. We feel case authority makes clear the necessity of reversal here. See, e.g., Fillippon v. Albion Vein Slate Co., 250 U.S. 76, . . ."

The Eighth Circuit then expressly adopted the reasoning of *Arrington* v. *Robertson*, 114 F.2d 821 (3d Cir. 1940).

The two decisions relied upon by the Seventh Circuit are readily distinguishable on their facts. Refusing to follow what it regarded as the "older per se rule" (Appendix 4a), the Seventh Circuit adopted as "sound doctrine" the decisions in *United States* v. *Compagna*, 146 F.2d 524, 528 (2d Cir. 1944), *cert. denied*, 324 U.S. 867 (1945), and *Walker* v. *United States*, 322 F.2d 434, 435 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 976 (1964). Neither decision has any relevance to the issue raised by the *ex parte* instructions to the jury in this case.

In *Compagna*—a 1944 decision—the jury asked the judge that certain testimony be read to them; the judge informally told the jury he would consider their note after lunch. Thereafter, the testimony was read to the jury in open court with the defendant and counsel present. The appeal concerned only the propriety of the judge telling the jury "they could go to lunch" and the testimony would be read when they "came back." 146 F.2d at 528. *Compagna* thus did not involve a substantive communication

or the giving of additional instructions in the absence of counsel.

In *Walker*, the jury's note and the judge's answer concerned Walker's co-defendants, not Walker. Before the jury returned a verdict, the trial judge informed Walker and counsel of the jury's note and the judge's response. "Walker took no exception and did not in any way indicate objection to the court's action." On appeal Walker "did not argue or suggest that he was prejudiced" by the judge's error. 322 F.2d at 435. On the contrary, Charm has contended in its motion for new trial and appeal that the trial judge's instruction caused the jury to render a verdict against Charm.

The decisions in *Parfet, Arrington* v. *Robertson* and *Speth* set forth the law that should control this case.[2] The trial judge's conduct in this case violated Charm's constitutional right to a fair trial by jury. Accordingly, this Court should grant certiorari to eliminate the conflict between the Circuits and reverse the erroneous ruling by the Seventh Circuit.

III. THE SEVENTH CIRCUIT'S FINDING OF "HARMLESS ERROR" RESTS ON A SET OF FALSE PREMISES REGARDING THE SUBJECT MATTER AND EFFECT OF THE IMPROPER COMMUNICATION BETWEEN JUDGE AND JURY.

The panel's factual conclusion that the trial judge's instruction to the jury was "irrelevant" cannot be sustained in light of the affidavit submitted by juror Scheele.

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[2] The Seventh Circuit's decision in this case cannot be squared with another panel's decision in *United States* v. *Dellinger*, 472 F.2d 340, 378 (7th Cir. 1972). Judge Cummings, the author of the majority opinion in *Dellinger* must have realized this when he voted to grant Charm's petition for rehearing. (Appendix 11a).

The jury's inquiry about the possible criminal liability of Brown and Goldman concerned a material issue in Charm's suit against Travelers. To recover on the fidelity bond Charm had to prove that it had suffered financial losses as a result of fraudulent or dishonest actions by employees Brown and Goldman. It is obvious that the jury was concerned or confused about that standard of misconduct. Their written inquiry could not be more directly related to Charm's lawsuit.

The affidavit of juror Scheele leaves no doubt that the judge's improper communication to the jury prejudiced Charm and establishes that the Seventh Court reached erroneous conclusions regarding the reason for the jury's inquiry and the influence of the trial judge's instruction upon the jury. The record shows that the trial judge's instruction caused the jury to decide against Charm. Mrs. Scheele's affidavit recites that:

> "3. The jury sent a note to Judge Perry, asking about Brown and Goldman's criminal liability, late in the second day of deliberations. At the time the note was written and sent, the jury was deadlocked on the issue whether Charm Promotions, Ltd. should recover from Travelers Indemnity Company.
>
> 4. The note directly related to whether Charm Promotions, Ltd. should recover from Travelers Indemnity Company.
>
> 5. The note was sent because the jury was confused regarding the Travelers Indemnity Company's liability for Brown and Goldman's acts and the jury had not heard any instructions by the trial judge which explained these matters.
>
> 6. The answer to the note caused the jury to decide the case against Charm Promotions, Ltd. and in favor of Travelers Indemnity Company.

7. If the note had not been answered, or if it had been answered in another manner, the jury's verdict would have been different." (Appendix 12a).

In these circumstances, the Seventh Circuit's decision is a grievous miscarriage of justice.

It is no answer to argue that the judge's previous instructions on this issue obviated the error or prejudice (Appendix 5a-6a). The jury had asked the judge to have his court reporter repeat the instructions because they did not hear parts of them; this request was signed by all jurors. The trial judge refused to repeat the instructions while counsel were present in the courtroom. (Trial transcript, p. 1287) These circumstances heighten the impropriety and error in his later *ex parte* instruction(s).

Apart from juror Scheele's affidavit, the record does not support the Seventh Circuit's conclusion that the *ex parte* communication was not relevant to the case. The jury deliberated for almost two full days, reaching its verdict shortly after the judge's answer to their question(s). It offends common sense to assume that the jury would ask the trial judge a question during their deliberations which did not concern the matter they were trying to decide. The presence of other serious errors in the trial further undercuts the Seventh Circuit's facile determination that no prejudice resulted from the *ex parte* instructions. The uncontradicted facts in the record below establish that the judge's communication to the jury without notice to counsel destroyed the integrity of their verdict.

CONCLUSION

For the reasons set out above, this Court should grant certiorari to reverse the Seventh Circuit's decision and resolve the conflict with the decisions of the Third, Eighth and Tenth Circuits.

Respectfully submitted,

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APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1973 SEPTEMBER SESSION, 1973

No. 72-1889
CHARM PROMOTIONS, LTD.,
Plaintiff-Appellant,
v.
THE TRAVELERS INDEMNITY COMPANY,
Defendant-Appellee,
v.
MEL GOLDMAN, RONALD M. BROWN and BERNIE SCHULMAN,
Third-Party-Defendants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
67 C 1489
JOSEPH SAM PERRY, *Judge.*

ARGUED SEPTEMBER 13, 1973 — DECIDED NOVEMBER 9, 1973

Before KILEY, CUMMINGS and SPRECHER, *Circuit Judges.*

PER CURIAM. Plaintiff Charm Promotions, Ltd. appeals from a jury verdict—in this diversity action—in favor of defendant Travelers Indemnity Company to recover under a fidelity bond written by Travelers covering Charm's "employees." We affirm.

In January, 1966, Charm was incorporated in Illinois pursuant to an agreement between Automatic Accounting Corporation (Automatic)[1] an Illinois corporation owned

[1] Goldman was president, and Brown was executive vice-president.

equally by Goldman, Brown, and Albert Heisler (the "Chicago Group"), and Weingeroff & Glick Enterprises, Inc. (Enterprises), a Rhode Island corporation owned by Frederick and Louis Weingeroff, George Glick, Harry and Joslyn Oken (the "Providence Group"). Automatic and Enterprises each loaned $75,000 to Charm, owned one-half of its stock, and named three Charm directors.[2] The directors designated, as Charm's officers, Goldman President, Frederick Weingeroff and Glick vice-presidents, Brown secretary, Harry Oken treasurer, and Heisler assistant vice-president.

Charm sold novelty charms and bracelets to supermarkets, the supermarkets paid Charm on delivery, and returned items not sold for full refunds. The Providence Group manufactured, packaged, and shipped the merchandise in Rhode Island, and the Chicago Group marketed the novelties in Chicago. Charm hired a promotional organization, J&H International Corporation (J&H) to act as its sales agent. Charm's books and records were kept in Chicago, but all checks issued by it had to be signed by an officer in Chicago and countersigned by one in Providence.

Shortly after incorporation. Charm purchased from Travelers a $400,000 fidelity bond to protect it against "any fraudulent or dishonest act or acts committed by any of the Employees." The bond defined "Employee" as:

> Any natural person (except a director or trustee of the Insured, if a corporation, who is not also an officer or employee thereof in some other capacity) while in the regular service of the Insured in the ordinary course of the Insured's business during the Policy Period and whom the Insured compensates by salary, wages or commissions and has the right to govern and direct in the performance of such

[2] Enterprises selected Glick, Harry Oken, and Frederick Weingeroff. Automatic named Heisler, Goldman and Brown.

> service, but does not mean any broker, factor, commission merchant, consignee, contractor or other agent or representative of the same general character.

Losses "due to any fraudulent, dishonest or criminal act by an Insured or a partner therein whether acting alone or in collusion with others," were excluded from coverage.

In February, 1967 Heisler informed the Providence Group that he suspected Goldman and Brown of improperly diverting approximately $235,000 of Charm's funds to their own use. The Providence Group determined the moneys had been diverted and secured the resignations of Goldman and Brown as Charm officers. Subsequently, Charm was unable to make refunds to supermarkets for returned merchandise and J&H assumed the Charm obligation of refunding approximately $400,000.[3]

Travelers refused to pay Charm's claimed losses under the terms of the fidelity bond. Charm filed this suit and Travelers then named Brown, Goldman, and Bernie Schulman third party defendants.[4] Following discovery, the trial court granted Travelers' motion for summary judgment. We reversed and remanded for a trial,[5] following which the jury found in favor of Travelers. This appeal followed.

No contention is made that the evidence does not support the verdict.

I

During the course of its deliberations, the jury sent a written question to the judge which he answered without

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[3] J&H has secured a judgment in the Circuit Court of Cook County against Charm for $328,524, the unpaid amount Charm presently owes J&H for its assumption of the obligation.

[4] Schulman was an alleged accomplice of Goldman and Brown.

[5] Our opinion is at 447 F.2d 607 (1971).

giving notice to counsel or the parties, and in their absence. Charm's counsel first became aware of the communication one week later. Neither the note nor the judge's answer thereto were preserved for the record but affidavits in the record of two jurors set forth the general character of the inquiry and answers: the jury asked whether Brown and Goldman "could have a criminal judgment brought against them;" the judge wrote back "No."

Charm contends that this ex parte communication constituted reversible error per se. We disagree.

We think that the recent decisional trend away from the older per se rule[6] in the federal courts[7] represents sound doctrine. Judge Learned Hand said in *United States* v. *Compagna*, 146 F.2d 524, 528 (2d Cir. 1944), *cert. denied*, 324 U.S. 867 (1945):

> [I]t is true that courts are extremely jealous of [communication between judge and jury] once the jury has been locked up; and we do not wish to abate that jealousy in the least; it is most undesirable that anything should reach a jury which does not do so in the courtroom. This is, indeed, too well settled for debate. [Citing cases.] But, like other rules for the conduct of trials, it is not an end in itself; and, while lapses should be closely scrutinized, when it appears with certainty that no harm has been done, it would be the merest pedantry to insist upon procedural regularity.

Later in *Walker* v. *United States*, 322 F.2d 434, 435 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 976 (1964), the

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[6] *Arrington* v. *Robertson*, 114 F.2d 821 (3d Cir. 1940); *Parfet* v. *Kansas City Life Insurance Company*, 128 F.2d 361 (10th Cir. 1942), *cert. denied*, 317 U.S. 654 (1942); *Breslin* v. *National Surety Company*, 114 F.2d 65 (3d Cir. 1930); *Shields* v. *United States*, 273 U.S. 583 (1927). Note that *Shields* was a criminal case where the demands of due process are especially strong.

[7] The issue is procedural rather than substantive, and therefore federal law controls.

defendant appealed his robbery conviction contending, inter alia, that the trial judge's ex parte answer to the jury's question was reversible error. Although the court agreed that the judge erred, it held: "Such an error does not require reversal, however, when the record shows with reasonable certainty that it did not prejudice the defendant's substantial rights."[8]

Walker and *Compagna* were criminal cases but that does not render them inapposite; on the contrary, the refusal to apply a per se rule when an individual's liberty is at stake is persuasive authority that a more rigorous standard is not mandated in civil cases. We hold that a trial judge's ex parte communication with the jury after it has begun its deliberations is not per se reversible error, but is controlled by F.R.C.P. 61:

> No error in . . . anything done . . . by the court . . . is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

In our opinion the substance of the communication did not "affect the substantial rights of the parties." Furthermore, at Charm's request, the trial court instructed the jury as follows:

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[8] See also *Ware* v. *United States*, 376 F.2d 717 (7th Cir. 1967); *United States* v. *Hoffa*, 367 F.2d 698 (7th Cir. 1966), vacated on other grounds, 387 U.S. 231 (1966); *United States* v. *Glick*, 463 F.2d 491 (2d Cir. 1972); *United States* v. *Arriagada*, 451 F.2d 487 (4th Cir. 1971). Professor Wright maintains: "When all of the circumstances about the communication are known, and when it can be said 'with certainty that no harm has been done,' it would be insisting on form to reverse." 3 FEDERAL PRACTICE AND PROCEDURE, 203 (1969).

> To warrant recovery under the bond, the "dishonest act" of an employee need not be such as would involve criminal liability of the employee for its commission. The meaning of fraud and dishonesty extends beyond acts which would be criminal.

The instruction informed the jury that dishonesty was not coextensive with criminality, but was broader, and the jury's subsequent communication with the judge was irrelevant to the ultimate issue: Travelers' liability to Charm for the dishonest acts of Charm's employees.[9] Although we disapprove the communication of the judge to the jury in absence of counsel, and the failure to preserve the notes, we hold that any error in the judge's conduct was harmless.

II

Just prior to the commencement of trial, and over the opposition of Charm, the court permitted third-party defendant Schulman to file a $210,000 claim against Charm and Enterprises. Schulman alleged that pursuant to an agreement, he developed two packaging machines for Charm and Enterprises for which he was to be paid $20,000 plus 20% of the savings realized from use of the machines.[10] The jury found in favor of Charm and against Schulman.

Notwithstanding its favorable verdict against Schulman, Charm contends that the trial court committed reversible error in permitting Schulman's claim to be filed because it confused the jury and prejudiced Charm's suit against

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[9] Admittedly the communication is susceptible to differing interpretations, but none of them relate to whether Brown and Goldman were employees who performed a dishonest act in the scope of their employment.

[10] Charm contended that the claim was untimely, was sham and false under F.R.C.P. 11, and violated F.R.C.P. 14(a). The district court eventually determined that Enterprises was not a proper party and eliminated reference to it in its jury instructions.

Travelers. Charm argues that Schulman's claim does not arise out of Charm's suit on the fidelity bond and thus clearly violates Rule 14(a):

> The third-party defendant may also assert any claim against the plaintiff arising out of the subject matter of the plaintiff's claim against the third-party plaintiff.

Furthermore, Charm argues that the claim was a sham since Schulman admitted the machines were never put into operation, and at the close of trial abandoned all but $15,000 of his claim.

Assuming, arguendo, that the Schulman claim violated Rule 14(a) and was a sham, we are not convinced that its inclusion in the case "misled . . . and distracted" the jury. Charm has failed to show it suffered prejudice; and in view of the weight of the evidence supporting the verdict, we decline to speculate that it was prejudiced.[11]

III

We find Charm's contentions that certain evidentiary rulings and jury instructions of the trial court were erroneous and prejudicial to be without merit.

During the trial, evidence was admitted relating to alleged earnings of Enterprises, Charm, and J&H, and Charm's obligation to J&H for the refunds paid to supermarkets. Charm argues the evidence was irrelevant and

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[11] There is no basis in the record to attribute to Travelers any purposeful tactical wrongdoing with regard to the Schulman claim. Travelers' counsel referred to it only once, in a statement that is too fragile to support any inference of wrongdoing:

> Your Honor, on behalf of defendant Travelers, we have no objection to the amended answer nor to the counterclaim, since it involves the same issues, and we think it would be better to dispose of everything at one time. [Tr. 4, June 19, 1972]

misleading.[12] The court also excluded as hearsay testimony of Glick and Glass concerning Heisler's statements to the Providence Group of Brown and Goldman's activities.

We see no error in these rulings. The main issue in the case was whether Goldman and Brown were employees and officers of Charm who committed dishonest acts in the course of their employment and whom Charm compensated by "salary, wages or commissions" and whom Charm had the right to govern and direct in their work. Travelers (and Goldman and Brown as third-party defendants) maintained that they were not employees; that Charm was part of a joint venture between the Chicago and Providence Groups; and that Goldman and Brown were either partners with the members of those Groups, or that they so controlled Charm that it was merely their alter ego, so that their acts in appropriating the moneys were acts of the "Insured" not covered by the policy. The evidence admitted was, therefore, relevant. Glick and Glass' testimony was offered to prove the truth of the matter asserted (that Heisler informed the Providence Group) in order to rebut the argument that a Chicago-Providence partnership existed, and was clearly excludable hearsay.

The district court, over Charm's objection tendered instructions to the jury on certain corporate formalities which Charm contends misstated the law applicable to

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[12] Charm also contends that this allegedly irrelevant evidence might have been excluded had the court conducted a pretrial conference as requested by Charm. The holding of a pretrial conference is within the court's discretion; and at the June 5, 1972 hearing on the holding of a conference, the court said: "If you want to limit it to some specific thing, or set me out something we can dispose of on the pretrial, I would be glad to." The court appeared willing to hold the conference had the subject been specified.

"small corporations" and were prejudicial.[13] While we agree with Charm that a closely held corporation need not comport with all the technical requirements of the Illinois Business Corporation Act,[14] the instructions given herein were not prejudicial.

Charm also argues that the court's instruction with respect to the method of salary payment was erroneous and contrary to this court's prior decision in this case. In material part, that instruction read:

> (3) That such fraudulent or dishonest acts, if any, were committed by employees whom Charm compensates by salary, wages or commissions, *during that period, the same period.* . . . (Emphasis added.)

In our earlier decision reversing the grant of summary judgment in favor of Travelers, we said:

> If the trier of fact should find that Charm compensated or intended in the future to compensate, Gold-

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[13] The instructions were:

It is the law in Illinois that the business and affairs of a corporation shall be managed by a Board of Directors. At the first annual meeting of the shareholders, and at each annual meeting thereafter, the shareholders shall elect directors to hold office. Meetings of the Board of Directors shall be held upon such notice as the by-laws may prescribe.

It is also the law in Illinois that officers of a corporation shall be elected by the Board of Directors at such time and in such manner as may be prescribed by the by-laws.

All officers and agents of a corporation, as between themselves and the corporation, shall have such authority and perform such duties in the management of the property as may be provided in the by-laws, or as may be determined by resolution of the Board of Directors.

Officers of a corporation, as such, are entitled to compensation, only as is fixed by a by-law of the corporation or a resolution of the Board of Directors fixing such compensation.

[14] See *Galler* v. *Galler*, 32 Ill. 2d 16 (1965).

> man and Brown for services performed in the ordinary course of business for Charm . . . the trier of fact could reasonably find that Goldman and Brown were employees of Charm within the policy definition, even if their compensation *was not periodic and regular* and even if any compensation paid was combined with a distribution of the profits of the company. (*Charm, supra,* at 611; emphasis added.)

Thus Charm contends that the instruction required it to prove more than this court said was necessary.

We hold that the instruction was not improper. We do not think that the instruction contradicts this court's earlier statement. "Periodic" is not synonomous with "during that period," and therefore compensation, even though not periodically and regularly paid, could have been paid during the period in question. Furthermore, the language of our prior opinion should not be extended beyond that purpose for which it was intended. We there reversed a summary judgment against Charm; we did not promulgate jury instructions.

Charm also contends that it was error to give a missing witness instruction with respect to Heisler. We hold that even if it was erroneous it was not prejudicial.

Judgment affirmed.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604
March 7, 1974

Before
Hon. Roger J. Kiley, Sr. Circuit Judge
Hon. Walter J. Cummings, Circuit Judge
Hon. Robert A. Sprecher, Circuit Judge

CHARM PROMOTIONS, LTD.,
Plaintiff-Appellant,
v.
No. 72-1889
THE TRAVELERS INDEMNITY COMPANY,
Defendant and Third Party Plaintiff-Appellee
and
MEL GOLDMAN, ET AL.,
Third Party Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
(67 C 1489)

On consideration of the petition for rehearing and suggestion that it be reheard *en banc filed* in the above-entitled cause, no Judge in active service having requested a vote thereon, nor any Judge having voted to grant the suggestion, and a majority of the members of the panel having voted to deny a rehearing,

IT IS ORDERED that the petition for a rehearing in the above-entitled cause be, and the same is hereby, DENIED.

Judge Cummings voted to grant the petition for rehearing.

AFFIDAVIT OF JUROR SCHEELE

RUTH SCHEELE, being first duly sworn on oath, deposes and says as follows:

1. I served as a juror in the lawsuit filed by Charm Promotions, Ltd. against The Travelers Indemnity Company, in the United States District Court for the Northern District of Illinois, which proceedings lasted from June 19, 1972 until June 30, 1972.

2. I have prepared this affidavit at the request of Lee A. Freeman, Jr. to supplement my previous affidavit, dated July 6, 1972.

3. The jury sent a note to Judge Perry, asking about Brown and Goldman's criminal liability, late in the second day of deliberations. At the time the note was written and sent, the jury was deadlocked on the issue whether Charm Promotions, Ltd. should recover from Travelers Indemnity Company.

4. The note directly related to whether Charm Promotions, Ltd. should recover from Travelers Indemnity Company.

5. The note was sent because the jury was confused regarding the Travelers Indemnity Company's liability for Brown and Goldman's acts and the jury had not heard any instructions by the trial judge which explained these matters.

6. The answer to the note caused the jury to decide the case against Charm Promotions, Ltd. and in favor of Travelers Indemnity Company.

7. If the note had not been answered, or if it had been answered in another manner, the jury's verdict would have been different.

Further affiant sayth not.

/s/ Ruth Scheele
Ruth Scheele

Subscribed and Sworn to before me
this 22nd day of December, 1973.
/s/ Dorothy Baueri
Notary Public
In And For Harris County, Texas
My Commission Expires June 1, 1975

APR 22 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1489

CHARM PROMOTIONS, LTD.,
Petitioner,

vs.

THE TRAVELERS INDEMNITY COMPANY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

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OCTOBER TERM, 1973.

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CHARM PROMOTIONS, LTD.,

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner presents one—and basically only one—contention to this Court. That contention is that this Court must declare it to be the law that *any* communication between Court and jury outside the presence of counsel invalidates a verdict —and that without regard to any question of whether or not the communication is prejudicial. The Petitioner contends that such a rule exists and that it is found in pronouncements of this Court. When Judge Learned Hand wrote:

> "But, like other rules for the conduct of trials, it is not an end in itself; and, while lapses should be closely scrutinized, when it appears with certainty that no harm has been done, it would be the merest pedantry to insist upon procedural regularity." (*U. S.* v. *Compagna*, 146 F. 2d 524, 528 (2d Cir. 1944))

he was stating both common sense and sound law. This Court denied certiorari (324 U. S. 867) in *Compagna* and also denied certiorari in *Walker* v. *United States*, 322 F. 2d 434 (D. C. Cir. 1963) *cert. denied* 375 U. S. 976.

In this case, the Court of Appeals met this question directly —not once but twice, since it was first raised by petitioner in its preliminary motion for summary reversal.

The Court of Appeals, in affirming the judgment entered in favor of respondent, neither overlooked nor misapprehended the issue presented. The decision of the Court of Appeals is reported at 489 F. 2d 1092 (7th Cir. 1973). The Court dealt with specifically and expressly rejected the "per se" rule asserted by petitioner—finding that the communication could not and did not "affect the substantial rights of the parties." (489 F. 2d at 1096)

Petitioner moved for a Stay of Mandate, supporting the motion with an affidavit of intent to file a Petition in this Court. Thereafter, however, a most unprecedented course of conduct was initiated. Petitioner seems to have taken the position that the decision of the Court of Appeals gave petitioner some right not to attack that decision through the ordinary process of review but to attack it through the presentation of evidence. Petitioner claimed a right to prove through "evidence" not in the record before the Court and not presented to the trial judge that the decision of the Court of Appeals was *in fact* wrong. For the purpose, petitioner presented to the Court of Appeals (after prescribed time) a Petition for Rehearing supported by the Affidavit of Ruth Scheele. Ruth Scheele was one of the jurors. She had given an affidavit which was filed in support of petitioner's motion for a new trial and considered by both the trial judge and by the Court of Appeals before the decision was rendered. She had moved to Texas. Petitioner pursued her there for a second affidavit. This second affidavit purported to recite the deliberations of the jury, to give the state of mind of the several jurors, and to cover, in affidavit form, what

"would have been" if there had been no communication between the trial court and jury. That the affiant could not properly testify to the matters set forth in the affidavit is patent. Even if the subject of inquiry were a proper one, and the forum an appropriate one, she could not testify concerning the thoughts, motives, or predicted activities of others. Moreover, the subject of inquiry was an improper one and there could be no "trial" in the Court of Appeals in any event.

Petitioner seems to assume or, at least, pretends to assume that the opinion of a Court of Appeals can be set aside by offering evidence to prove that a conclusion reached by the Court is not a "fact". This attitude represents such a total deviation from all accepted standards of judicial procedure, that it is difficult to believe that it is presented in good faith.

The conclusions of a Court of Appeals are based upon the record before the Court. A Court of Appeals reviews the decision of a trial court, and its decision is based upon matters presented in the trial court. The decision of a Court of Appeals is subject to review, but only in the manner provided by statute. It is not subject to attack by offering new evidence designed to prove that it is wrong. Petitioner simply cannot do what it has attempted to do. An affidavit of a juror cannot attack the conclusion of the Court of Appeals that: ". . . the jury's subsequent communication with the Judge was irrelevant to the ultimate issue: Traveler's liability to Charm for the dishonest acts of Charm's employees." (489 F. 2d at 1096)

There are several reasons why this is so.

In the first place, the conclusion of the Court of Appeals is one of law and not one of fact. The Court properly pointed out that dishonesty is not coextensive with criminality. This is a proper statement of law and was even so stated to the jury in an instruction tendered by petitioner. Because petitioner says in a brief that criminal liability was "a material issue" does not make it so—and particularly when the jury has been instructed

to the contrary at petitioner's own request. Criminal liability—if any—is *not* material. (We can ignore the fact that the answer of the judge was that there was no criminal liability.) Decisions of Courts of Appeal on matters of law are not overruled by affidavits of jurors.

Secondly, the verdict of a jury cannot be impeached by the affidavit of a juror. Jurors are permitted in certain circumstances to testify to the fact of communication and what the communication was, but the holdings are uniform that the deliberations of jurors are not to be reviewed outside the jury room. Contentions going to the state of mind of the jurors, their understanding of facts or law, or any of those matters which form part of the decision-making process are not subject to review. This Court has set forth the basis for this governing principle of law:

> "But let it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those that took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside the verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation—to the destruction of all frankness and freedom of discussion and conference." *McDonald* v. *Pless*, 238 U. S. 264, 35 S. Ct. 783, 59 L. Ed. 1330 (1915).

Ruth Scheele was one of twelve—her opinions are the opinions of one. It can be noted that her affidavit states that the jury was deadlocked before the note was sent—a situation in which petitioner could not prevail. But the law does not permit outsiders to review the process by which a jury moves to its unanimous decision. That decision cannot be impeached by

the testimony of a juror, much less by an affidavit not meeting the tests applied to direct evidence.

There is absolutely no reason why this case warrants review by this Court. It involves no substantial federal question upon which a decision of this Court would have any value as precedent. This is a very particular situation. It centers entirely upon the attempt of Petitioner to use the affidavit of Ruth Scheele —an affidavit which is incompetent in itself and which could not be used in the manner attempted in any event. This case has been decided properly. The decision of the Court of Appeals is clear and unambiguous. Petitioner seeks to establish a rule which would require reversal where there is no prejudice—a rule that would be a senseless one and a bad one. This Court has repeatedly denied certiorari when there has been an attempt to establish such a rule and it should be denied in this case.

Respectfully submitted,

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No. 73-1489

In the
Supreme Court of the United States
October Term, 1973

CHARM PROMOTIONS, LTD.,
Petitioner,
vs.
THE TRAVELERS INDEMNITY COMPANY,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1973

No. 73-1489

CHARM PROMOTIONS, LTD.,
Petitioner,

vs.

THE TRAVELERS INDEMNITY COMPANY,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The brief filed by Travelers sharply points up the reasons that the federal courts have consistently held it reversible error for a trial judge to give substantive instructions to the jury during their deliberations without notice and in the absence of counsel. The issue raised by Charm, which Travelers fails to discuss, compels reversal of the decision below.

Travelers does not dispute the critical fact that the Seventh Circuit's ruling conflicts with the Supreme Court's decision in *Fillippon* v. *Albion Vein Slate Co.*, 250 U.S. 76 (1919), and the decisions of the Third, Eighth and Tenth

Circuits. Instead, Travelers argues for affirmance on the ground that appellate review may only be "based upon matters presented in the trial court." (p. 3) The judgment below cannot be sustained, however, for the very reason that the trial judge improperly gave additional instructions to the jury *outside the record,* without notice to counsel, and failed to maintain any record of what occurred.

Travelers strongly complains that the verdict cannot be impeached by the affidavit of a juror regarding the reason that the jury made inquiry to the judge and the effect of the judge's reply upon their verdict.* This argument demonstrates the wrongness of the novel position adopted by the Seventh Circuit. It is not feasible, and ordinarily not proper, for litigants to attempt to determine the impact of outside influences upon the jury during their deliberations. Charm would not have undertaken to show the prejudice that in fact resulted from the *ex parte* instructions but for the Seventh Circuit's decision imposing that burden. This erroneous rule of law forces the losing party to secure all available facts regarding the circumstances and effect of improper conduct. Consequently, every jurisdiction which has considered this question, other than the Seventh Circuit, holds that such interference with the jury's function entitles a litigant to a new trial without respect to the prejudice caused.

Travelers mischaracterizes Charm's contention as being that *any communication* between the trial judge and the jury in the absence of counsel should invalidate the ver-

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* It should be noted that the Court of Appeals granted Charm leave to file the petition for rehearings which was based on the affidavit of Ruth Scheele. Judge Cummings voted to grant rehearing after the submission of the Scheele affidavit.

dict. On the contrary, the error in this case concerns the giving of *substantive* instructions to the jury during their deliberations. The federal decisions draw a clear distinction between instructions regarding issues in the case which compel reversal, and ministerial communications, such as occurred in *United States* v. *Compagna*, 146 F.2d 524, 528 (2d Cir. 1944), which may be excused depending on the particular circumstances.

For the reasons set forth in the Petition, this Court should grant certiorari to resolve the conflict created by the Seventh Circuit's decision. The logical necessity for a *per se* rule, and the overwhelming precedent holding that the circumstances in this case deprived Charm of a fair trial, makes summary reversal appropriate.

Respectfully submitted,

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